



North Dakota Attorney General's LAW REPORT

Wayne Stenehjem, Attorney General
State Capitol - 600 E Boulevard Ave. Dept 125
Bismarck, ND 58505-0040
(701) 328-2210

January-February-March 2003

ENTRAPMENT - INVESTIGATION OF A MINOR

In *State Hammeren*, 2003 ND 6, 655 N.W.2d 707, the court affirmed the defendant's convictions of delivery of a controlled substance.

A confidential informant assisted officers in the investigation of the defendant, who was then 16 years of age, of being involved in drug-related activity. The informant made two tape-recorded telephone calls to the defendant to set up a meeting and the defendant agreed to sell drugs to the informant. The informant traveled to the defendant's home with a deputy, made a drug purchase, and the defendant was subsequently charged with delivery of a controlled substance in juvenile court. Jurisdiction was transferred from juvenile court to the district court.

The defendant claimed that he was entrapped as a matter of law. The court recognized that entrapment is an affirmative defense and the defendant has the burden of proving, by a preponderance of the evidence, that entrapment occurred. In this case, the informant had purchased drugs from the defendant prior to the charged sale after having called the defendant and completing the purchase with funds supplied by the police. The court found nothing in the facts of the case to indicate law enforcement officers engaged in outrageous conduct. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. In addition, the mere fact that an

acquaintance persuaded a defendant to make a sale or the hiring of an informant by law enforcement officers establish entrapment as a matter of law.

The defendant also claimed that the trial court should have instructed the jury on the defense of contributing to the delinquency of a minor, claiming that the law enforcement officers violated the law when they willfully encouraged, caused, or contributed to the delivery of a controlled substances by the defendant to the informant. The defendant claimed that the offense of contributing to the delinquency of a minor established a policy that would prohibit police from using law enforcement tactics commonly used against adult offenders, such as having a confidential informant make a controlled purchase, when the target of the investigation is a minor. Rejecting this claim, the court noted that N.D.C.C. ch. 27-20 recognizes that minors will be engaged in drug related activity and declared that those minors should be prosecuted as adults if certain circumstances exist. A juvenile judge's authority to transfer a minor from juvenile court to the district court implies that society has acknowledged that certain actions taken by a juvenile may signal an end to childhood. Allowances made for the juvenile's lesser moral and social development will no longer be tolerated or accepted. Law enforcement officers are entitled to investigate and prosecute minors engaged in drug related activity the same way they would an adult.

DNA - TESTING AND DATA BASE

In *State v. Leppart*, 2003 ND 15, 656 N.W.2d 718, the court concluded that 2001 amendments to N.D.C.C. § 31-13-03 authorized DNA testing of persons convicted of nonsexual felonies and established a DNA data base for test results of persons convicted of those offenses. The court also concluded that the statutory amendments were constitutionally valid.

The defendant refused to provide an oral swab under N.D.C.C. § 31-13-03 for a DNA sample. The defendant was convicted in 1997 of felonious restraint and aggravated assault. In 2001, the Legislature amended N.D.C.C. § 31-13-03 to require DNA testing a person who is convicted after July 30, 2001, of certain nonsexual felonies, including aggravated assault and felonious restraint, or of persons in the custody of the Department of Corrections and Rehabilitations after that date as a result of a conviction for one of those offenses. However, the 2001 Legislature did not amend N.D.C.C. § 31-13-05 to include the test results for persons convicted of the additional nonsexual offenses in a centralized DNA data base.

In January 2002, Leppart was requested to provide a DNA sample by oral swab as a result of his 1997 convictions. The defendant resisted and challenged the constitutionality of N.D.C.C. § 31-13-03 including his right to equal protection. The trial court subsequently denied the state's motion to require the defendant to submit to DNA testing concluding that N.D.C.C. § 31-13-03 violated the defendant's equal protection rights.

On appeal, the state argued that the 2001 amendments to the section were rationally related to a legitimate government purpose. Under the federal constitution, unless a statute invokes strict scrutiny because it interferes with a fundamental right or discriminates against a suspect class, a statute will ordinarily survive an equal protection challenge if it is rationally related to a legitimate government purpose and heightened or intermediate scrutiny is

generally applied only in cases involving classifications based on sex or illegitimacy.

The defendant claimed that he had a fundamental right of privacy in his DNA and the strict scrutiny standard of review applied to his equal protection challenge.

In reversing the trial court, the court recognized that DNA testing has generally survived various constitutional challenges. The majority of courts that have considered equal protection challenges to statutes authorizing DNA testing have applied the rational basis standard of review. They have rejected the application of the strict scrutiny test and have concluded that a convicted person has a diminished expectation of privacy and does not have a fundamental privacy right to be free from DNA testing. The courts applying the rational basis test generally have concluded statutes authorizing DNA testing of a class of convicted persons bear a rational relationship to legitimate government interests in apprehending and prosecuting repeat sex offenders and other violent offenders. The court agreed with the majority of courts applying the rational basis test to equal protection challenges to statutes authorizing DNA testing.

The trial court concluded that the expansion of persons and offenses subject to DNA sampling did not correspond with the purpose of the DNA data base as set forth in N.D.C.C. § 31-13-05 to assist law enforcement agencies in the identification or prosecution of sex-related crimes. The trial court also concluded that the statutory language constituting the statutory purpose for DNA sampling did not match the expansion in the year 2001 of the offenses subject to DNA sampling.

In rejecting these conclusions, the court held that, when read together, the two statutes authorize DNA testing of persons convicted of enumerated nonsexual felonies and inclusion of those test results in the

centralized DNA data base. A court will construe statutes as whole to determine legislative intent because the law neither does, nor requires, idle acts. In addition, statutes will be construed to avoid absurd or ludicrous results.

Applying the trial court's rationale, the 2001 amendments to N.D.C.C. § 31-13-03 would be rendered largely ineffective if those amendments were construed to authorize DNA tests for certain nonsexual offenders but to preclude those results from being placed in a centralized DNA data base. Although not explicitly articulated in the 2001 amendments to N.D.C.C. § 31-13-05, the legislative history supported the expansion of the centralized DNA data base to include test results for persons convicted of the additional enumerated nonsexual offenses.

The court also rejected the trial court's conclusion that the Legislature must explicitly articulate its intent in a statutory enactment to satisfy the rational basis level of review of equal protection claims. Under the rational basis test, it is sufficient if the legislature had any identifiable or conceivable purpose to support a statute. In this case, the legislative history reflects that the legislature expanded the offenses for DNA testing to include additional violent felonies. That purpose is rationally related to legitimate governmental purposes of apprehending and identifying perpetrators of future sex related and violent crimes, exonerating the innocent, and increasing cost efficiency. The provisions authorizing DNA testing for nonsexual felonies are rationally related to legitimate government purposes and satisfy the rational basis standard of review.

SEARCH WARRANT - FRANKS STANDARD

In *State v. Holzer*, 2003 ND 19, 656 N.W.2d 686, the court affirmed the defendant's conviction of various drug offenses.

A vehicle was stopped by police officers and its occupants were arrested for possession of drug paraphernalia. One of the occupants, who claimed to be Joshua Steen, was brought to the police department for processing after his arrest. At the police department, this individual admitted that he had been lying about his identity and he was actually Jayson Steen, and not Joshua Steen. At that time, Jayson Steen was subject to an outstanding arrest warrant. In exchange for being released, Steen offered information regarding the operation of a methamphetamine lab. Steen provided detailed information regarding cooking of methamphetamine at a residence. A search warrant was obtained based upon this information but the officer did not inform the magistrate that Steen had been lying about his identity or the fact that Steen had offered the information in return for his release.

Holzer claimed that had the information as to Steen's credibility been provided to the magistrate, no probable cause to issue the warrant would have existed. Applying the Franks v. Delaware, 438 U.S. 154 (1978) standards, the court noted that, in order to succeed on a Franks challenge based on an allegation of omitted information, the defendant must show that the police omitted facts with intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, and that the affidavit supplemented by the omitted information would not have been sufficient to support a finding of probable cause.

Under the second part of the test, a court must determine whether the omissions, if added into the warrant application, would have defeated probable cause. The defendant would have to show that if the police officer's testimony would have included the alleged omissions, probable cause would not have existed for the judge to issue the search warrant.

Making a determination as to probable cause becomes more difficult when information is presented from an informant. The reliability of an informant remains pertinent to a determination of whether or not probable cause exists for the issuance of a warrant based upon that informant's statement, particularly when that informant is a member of the "criminal milieu." The informant in this case cannot be classified as a citizen informant. He more accurately fell within that category of informants who are themselves criminals, drug addicts, or even pathological liars. Reliability for such an informant must be established.

In this case, the magistrate who issued the warrant was told that Steen was in a vehicle in which drug paraphernalia and methamphetamine had been found and there was an outstanding warrant for his arrest. The magistrate knew Steen's credibility was questionable. Any additional information as to Steen's dishonest behavior would have only confirmed what the magistrate already knew. In addition, the fact that Steen gave his statement in exchange for his own

release would not have defeated probable cause if added to the warrant application. Magistrates issuing warrants know that deals are made with informants who themselves have been charged. Omission of the fact that the informant is charged with a crime and is cooperating to gain leniency is not a misrepresentation and is not clearly critical to the issuing judge.

In addition, Steen provided first hand information as to what he saw at the defendant's residence, including detailed information regarding the location and amounts of methamphetamine, location and types of drug paraphernalia, and ingredients for manufacturing methamphetamine. His level of specificity of describing the drug activity that was taking place at the residence made it more likely that the information provided was accurate. Considering the totality-of-the-circumstances, especially the detailed, first-hand knowledge the informant provided, failure to inform the magistrate that Steen had lied about his identity and that he had received a deal did not defeat probable cause to issue the search warrant.

REVOCATION OF PROBATION - INSANITY DEFENSE

In *State v. Olson*, 2003 ND 23, 656 N.W.2d 650, the court affirmed an order revoking the defendant's probation.

The defendant was on probation for violation of a domestic violence protection order. While on probation, the defendant again violated the order, which resulted in the petition to revoke the defendant's probation.

The defendant claimed a defense of lack of criminal responsibility which was rejected by the trial court at the revocation proceeding.

In affirming the trial court, the court noted that violation of a domestic violence protection order does not specify a culpability requirement. It is a strict liability offense for which no proof of intent is required. Even though it is a strict liability offense, a defendant may present an affirmative

defense of an unwitting violation of the order involving innocent or mistaken conduct.

However, this case is not an appeal from the defendant's conviction for violation of a domestic violence protection order but, rather, an appeal from orders entered in a proceeding to revoke the defendant's probation for violating conditions of probation upon his conviction of a crime. Conditions of the probation order included no contact with the victim and that any violation of the protection order would be a violation of probation. At the probation revocation hearing the defendant was permitted to present evidence regarding an unwitting, innocent, or mistaken conduct defense, but the defense did not prevail.

The court concluded that the defendant's asserted defense of lack of criminal

responsibility was not a defense to a probation revocation proceeding. Probation revocation, like parole revocation, is not a stage of a criminal prosecution. If an alleged probation violation is contested, the prosecution must establish the violation by a preponderance of the evidence. Insanity generally is not a defense in a proceeding to revoke probation or parole. It may, however,

be a relevant mitigating factor in determining if probation should be revoked. One of the conditions of probation prohibited the defendant from having any contact with the victim and not merely willful contact with her. The relevant issue is whether the defendant violated the conditions of his probation and not why he violated those conditions.

PROBATION REVOCATION - PLEA AGREEMENT

In *Peltier v. State*, 2003 ND 27, 657 N.W.2d 238, the court affirmed the sentence imposed upon Peltier upon his revocation of probation.

In 1997, Peltier pled guilty to four class C felony charges pursuant to a plea agreement that imposed concurrent sentences. In 2001, Peltier violated the terms of his probation and the probation was revoked. The trial court sentenced Peltier on several charges requiring that sentences to be served consecutively.

Peltier later filed an application for post-conviction relief claiming that the trial court violated state law when it imposed consecutive sentences upon revocation of his probation because the original plea agreement required concurrent sentences. This application for post-conviction relief was denied.

North Dakota law allows a trial court to impose a harsher sentence upon revocation of probation. Resentencing a defendant after revocation of probation to a sentence greater

than that originally imposed does not violate the double jeopardy or due process clauses. Policy in North Dakota is that a sentence which includes probation is not final but is designed to provide a flexible alternative that allows the trial court to monitor the defendant's conduct while on probation and to alter the defendant's sentence if the initial sentence of probation is not effective.

Even if, at the original sentencing, Peltier and the state had entered into a binding plea agreement, both Peltier and the state satisfied the conditions of that binding plea agreement at the original sentencing hearing when the trial court sentenced Peltier according to the terms of the agreement. As a result, the trial court was no longer bound by the terms of the plea agreement and was free to impose consecutive sentences resulting in a harsher sentence upon revocation of Peltier's probation. The trial court was not bound by the terms of the original plea agreement when it sentenced Peltier upon revocation of his probation.

GROSS SEXUAL IMPOSITION - EVIDENCE OF ONGOING COURSE OF CONDUCT

In *State v. Anderson*, 2003 ND 30, 657 N.W.2d 245, the defendant's conviction of seven counts of gross sexual imposition were affirmed.

The defendant was charged with gross sexual imposition for engaging in sexual acts with his daughter and compelling her to submit by force in the year 1999. The state

sought to introduce letters the defendant wrote to this daughter in the year 2000 that indicated sexual acts had occurred in the past between the defendant and his daughter, made reference to sexual acts directed at his daughter which he desired to engage in after he got out of prison, and referred to her as "hot stuff."

The defendant filed a motion in limine to exclude the letters the defendant wrote to his daughter in 2000. The trial court denied the motion but no objection was made to the letters at trial. By failing to properly object at trial, the defendant failed to preserve the issue for appellate review. The failure to object at trial acted as a waiver of the claim of error.

Even though the defendant may have waived his objection to the introduction of the letters, the court did conclude that the letters the

defendant wrote to his daughter were admissible as probative evidence of the defendant's involvement in the offenses being prosecuted, contained evidence of the seven counts of forcing his daughter to engage in the sexual acts of which he was charged, and they projected a continuation of the activities which had occurred in the past and which were part of an ongoing course of conduct the defendant was charged with in this case. Admission of the letters was not unfairly prejudicial to the defendant.

JURY INSTRUCTIONS - INCONSISTENT VERDICT

In *State v. Jahner*, 2003 ND 36, 657 N.W.2d 266, the court affirmed the defendant's conviction of negligent homicide, reckless endangerment, and DUI.

The defendant was charged with manslaughter, reckless endangerment, and DUI after a vehicle crash killed one person. Four other persons were injured, including the defendant. At trial, a jury found the defendant not guilty of manslaughter but guilty of the lesser included offense of negligent homicide, as well as reckless endangerment and DUI.

During the trial, the jury made an inquiry concerning the testimony of the defendant and, rather than bringing the jury into the courtroom to have the information requested by the jury given to it, all parties agreed to a jury response.

N.D.C.C. § 29-22-05 confers a statutory right upon a defendant to have the jury brought into the courtroom and to have the information requested by the jury given to it. Statutory rights may be waived by the party entitled to the benefit unless a waiver would be against public policy or the statute declares or implies there cannot be a waiver. Litigants seeking to take advantage of irregularities occurring during the course of trial, either on the part of the court, the jury, the adverse parties, or anyone acting for or on their behalf, must do so at the time the

irregularities occur in order that the court may take appropriate action if possible to remedy any prejudice. As a general rule, one who fails to make an appropriate objection at the trial court level waives the right and cannot waive the issue for the first time on appeal. The defendant's attorney had the opportunity but failed to object to the trial court's procedure in responding to the jury's request. The trial court should have provided testimony of the defendant to the jury at its request but the defendant's attorney did not object and approved the court's response to the jury's request to rely upon their own recollection. The defendant waived his right to claim error for the trial court's procedure in responding to the jury's request.

The defendant also claimed that the trial court committed reversible error by denying the state's request, on which the defendant relied, to instruct the jury on the definition of reasonable doubt. The trial court decided the definition of proof beyond a reasonable doubt would not be given unless the jury asked a question about it during deliberations.

Counsel must designate the jury instructions that are objectionable and only those instructions so designated are deemed accepted by counsel. An attorney's failure at trial to object to instructions when given the opportunity operates as a waiver of the right to complain on appeal about instructions that either were or were not given. Because the

defendant's attorney did not object at trial to the court's refusal to instruct the jury on the definition of proof beyond a reasonable doubt when he was given the opportunity, the defendant waived his right to complain on appeal about the jury instructions.

The court has long recognized the difficulty in defining reasonable doubt and has neither required nor prohibited a definition on reasonable doubt. Reversible error would result if a court gives a jury instruction on reasonable doubt and the language in the instruction is contrary to the law. As long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.

In this case, the jury was instructed the burden of proof rested upon the state, and the state satisfied its burden only if the evidence proved to the jury's satisfaction the essential elements of each offense charged beyond a reasonable doubt. The trial court's instructions, as a whole, correctly and adequately advised the jury of the law. The trial court was not required, and did not commit error when it refused, to instruct the jury on the definition of proof beyond a reasonable doubt.

The defendant also claimed that the verdict was inconsistent since the jury found him not guilty of manslaughter, with a criminal culpability of "recklessly," but found him guilty

of reckless endangerment with a similar culpability. The apparent inconsistency to be reconciled was whether it is legally inconsistent for the jury to acquit the defendant of manslaughter but to find him guilty of reckless endangerment, because both offenses require the same level of culpability.

Each charge is examined separately and analyzed if the evidence supports the conviction to determine if the jury returned an inconsistent verdict. The level of culpability for an offense is analyzed at the time the person engaged in the conduct which constituted an offense. In this case, the evidence permitted the jury to find the culpability level related to the death of one passenger differed from the culpability level determined for the period prior to the death when the passengers had requested the defendant to slow down. One of the passengers in the case testified that prior to the accident the passengers were hollering at the defendant, who was driving the vehicle, to slow down but he would not listen. Even if the jury fails to convict the defendant on a charge having a similar element to a charge on which the defendant is convicted, there is no legal inconsistency if there is substantial evidence to support the charge on which he is convicted. The evidence supported the jury's finding that the defendant recklessly endangered the lives of the passengers prior to the death of another passenger, the verdict was supported by the evidence, and it was not legally inconsistent.

POST-CONVICTION PROCEEDING - MISUSE OF PROCESS

In *Murchison v. State*, 2003 ND 38, ____ N.W.2d ____, the court affirmed the summary disposition of Murchison's third application for post-conviction relief.

Section 29-32.1-12(2)(a) of the North Dakota Century Code allows a court to deny a post-conviction application on the grounds of misuse of process when a defendant inexcusably fails to pursue an issue leading

to judgment of conviction, inexcusably fails to pursue an issue on appeal having raised the issue in the trial court, or inexcusably fails to raise an issue in an initial post conviction proceeding. In this third application for post-conviction relief, Murchison claims that he was denied due process because the trial court did not conduct a psychological evaluation prior to sentencing, he was denied effective assistance of counsel on appeal,

and he was denied a speedy trial. Each of these grounds either were not raised in his direct appeal of conviction or in his prior application for post-conviction relief, or had been fully and finally determined in a

previous proceeding. The grounds asserted by Murchison in his third post-conviction application either constituted misuse of process or res judicata, subject to summary disposition.

INSANITY DEFENSE - PHOTOGRAPHS - JURY QUESTIONS

In *State v. Klose*, 2003 ND 39, 657 N.W.2d 276, the court affirmed the defendant's conviction of murder. At trial, the defendant's expert witness testified that the defendant was in a "profoundly psychotic state" at the time of the killing of the victim. The defense expert further testified that the defendant's insanity was caused by alcohol withdrawal delirium and, at the time of the killing, the defendant was experiencing delirium tremens which affected him to such an extent that his conduct was a result of either a loss or serious distortion of his capacity to recognize reality.

The defendant did not testify at trial but the expert testified as to what the defendant had told her in interviews with him regarding hallucinations and his consumption of alcohol.

A police officer who examined the crime scene testified that he found a broken shotgun, clothing, and a towel that appeared to be soiled with blood. A bathroom sink appeared to have water drops with pinkish residue as though the defendant had cleaned himself at the sink. Another officer testified that when he arrived, the defendant was fully dressed in clean clothing. The medical examiner concluded that a struggle had occurred based upon injuries to the victim's body and that a shotgun found in the defendant apartment, partially broken near the stock, had red stains and hair on it and was likely used to inflict injuries upon the victim.

During jury deliberations, the jury asked whether physical or mental symptoms relating to alcoholic withdrawal had been used in this manner previously in a murder trial. Although there was a dispute as to

whether an agreement existed for the response, both parties agreed that the court could respond to the jury by written note telling the jury to concentrate on the evidence presented. The jury acquitted the defendant on the charge of burglary and convicted him of murder.

The defendant first argued that the state failed to prove beyond a reasonable doubt that his defense of lack of criminal responsibility by reason of mental disease or defect did not exist at the time of the murder.

Lack of criminal responsibility is a "defense" to criminal conduct and once it is raised by a defendant, the state must prove its nonexistence beyond a reasonable doubt. The state argued that the defendant killed the victim while he was sane and alleged his recollection of the night was a cover story he invented to explain his actions. Upon review of the evidence presented to the jury, the court found competent evidence allowing the jury reasonably to infer that the defendant was sane at the time of the killing, fairly warranting a conviction of murder.

The defendant also argued that photographs of the crime scene should not have been admitted into evidence.

A district court has broad discretion in admitting or excluding evidence and deciding whether evidence is relevant or not relevant. Photographs may be admitted in criminal trials at the district court's discretion even if the photographs could have the additional effect of exciting the emotions of the jury. When photographs are relevant or aid a witness's testimony, even gruesome pictures are admissible for the purpose of offering proper proof. The photographs in this case

were properly used to show the chain of events and the circumstances surrounding the murder. Pictures showing the placement of the victim's body were relevant and the district court did not abuse its discretion in admitting those photographs.

The defendant also argued that the district court improperly communicated with the jury in his absence and that the communication was harmful error even if the defendant's attorney assented to such a communication. Section 29-22-05 of the North Dakota Century Code requires a court to respond to a jury question either in the defendant's presence in open court or after sufficient notice has been given to the defendant. Upon receiving a written question from the jury, the trial judge in this case met with counsel in chambers and discussed the question presented by the jury. Defendant's

counsel was present in chambers the entire time the trial judge discussed what type of answer would be appropriate to give to the jury and the defendant's counsel assented to the trial court giving the jury an answer in writing. The defendant was present at every stage of the trial including the conference in chambers, and the defendant's counsel participated in the discussion of how to respond to the jury's questions, agreed the trial court could answer the jury by written note, and did not object to the note until five days after it received it during open court. Because the defendant's counsel was given full opportunity to participate in the discussion deciding the manner in which the answer would be given to the jury, the district court did not communicate improperly with the jury and did not commit error.

DUI - BRADY - RULE OF COMPLIANCE

In *City of Grand Forks v. Ramstad*, 2003 ND 41, ____ N.W.2d ____, the court affirmed the defendant's conviction of DUI.

Prior to trial, the defendant's attorney served discovery requests upon the city attorney requesting information pertaining to the breath analyzer and the test operator. The city provided its entire file but not the specific information requested by the defendant.

On the day before trial, the defendant served a motion to suppress evidence of the chemical test results because of the city's failure to provide requested discovery materials. On the morning of the trial, the trial court heard the suppression motion and denied the motion and a motion for continuance. The defendant's attorney advised the court that the defendant had retained an expert who would have testified if the breath analyzer records had been provided earlier.

The defendant argued that the requested information was exculpatory or could have been used to impeach the accuracy of the

breath analyzer. It was further contended that the city's failure to disclose those records violated the defendant's due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

To establish a Brady violation, the burden is upon the defendant to show that the government possessed evidence favorable to the defendant, the defendant did not possess the evidence and could not have obtained it with reasonable diligence, the prosecution suppressed the evidence, and a reasonable probability existed that the outcome of the proceedings would have been different if the evidence had been disclosed.

If the evidence is not exculpatory or valuable for impeachment purposes, the evidence is not Brady material and the government has no duty to disclose it. By definition, Brady materials are plainly exculpatory and Brady does not apply where it is merely speculative whether the evidence might have been exculpatory or might have been inculpatory. If the defendant fails to demonstrate that the evidence was favorable to him, there is no Brady violation. In this case, the defendant

failed to present any evidence that the undisclosed materials would have been exculpatory or would have called into question the accuracy of the breath analyzer. Under these circumstances, the defendant failed to demonstrate a Brady violation.

Failure to disclose Brady material is a due process violation and may provide the basis for a new trial. The due process clause, through Brady, is not implicated where the evidence is not plainly favorable to the defendant and it is merely speculative whether the evidence might have been exculpatory or valuable for impeachment. In raising a Brady challenge, it is incumbent upon a defendant to supplement the record if necessary to establish that the undisclosed materials were in fact favorable to him.

In addition, a defendant alleging a Brady violation must show that he could not have obtained the undisclosed evidence with reasonable diligence. The Brady rule does not apply to evidence the defendant could have obtained with reasonable diligence. The materials sought in this case were public records readily available through the state toxicologist's office. The defendant failed to provide any reason why he could not, with reasonable diligence, have obtained these materials on his own.

The defendant also argued that the city's failure to provide the requested documents violated North Dakota Rule of Criminal Procedure 16. Rule 16 is a discovery rule, not a constitutional mandate, and is designed to further the interest of fairness. Upon proof of a discovery violation under Rule 16, the trial court has the discretion in applying remedies under that rule for such a violation, but the court will not disturb its decision absent an abuse of discretion.

The city contended that it fully complied with Rule 16 by providing a copy of the prosecutor's entire file to the defendant. Although the court may approve of an open file policy by prosecutors, such a policy does not automatically insure compliance with North Dakota Rule of Criminal Procedure 16.

Generally, Rule 16 also requires the prosecution to disclose requested documents in the possession of other governmental agencies that participated in the investigation of the defendant or have otherwise cooperated with the prosecution. Limiting application of Rule 16 to materials in the actual possession of the prosecution unfairly allows the prosecution access to documents without making them available to the defense.

An open file policy does not abrogate or dilute the requirement that prosecutors disclose evidence requested under Rule 16. The prosecution's disclosure of its entire file did not abrogate its duty to provide requested documents to which the prosecution had access and that were in the possession of a state agency which provided assistance to the prosecution. The prosecution's disclosure of its entire file did not satisfy its duty to provide discovery under Rule 16. In addition, Rule 16 contains no exception for documents that are otherwise available to the defendant. Any suggestion that the prosecution had no duty to provide requested documents to the defendant if he had other means to obtain them falls far short of compliance with Rule 16. The city violated Rule 16 when it failed to disclose the requested documents.

However, if a discovery violation is not of a constitutional magnitude, it is reversible error only upon a showing that defendant has been denied substantial rights. No substantial rights are affected when the defendant was not significantly prejudiced by the discovery violation. If the defendant fails to show he was significantly prejudiced by a discovery violation, a trial court's failure to exclude evidence or impose other sanctions under Rule 16 does not constitute an abuse of discretion. A defendant is in a weak position to assert prejudice from the prosecution's failure to produce requested documents or other materials under Rule 16 when the defendant had other available means to obtain the requested material. In this case, the defendant failed to demonstrate he was significantly prejudiced by the discovery violation.

The court did provide an additional warning to prosecutors in the state. The court stated that its opinion would place all prosecutors on notice that North Dakota Rule of Criminal Procedure 16 does not allow them to shift the burden of obtaining materials in the hands of other governmental agencies to the defendant. Although a showing of prejudice

is generally required before reversing a criminal conviction for a discovery violation, reversal for conduct that is merely potentially prejudicial may be warranted as a sanction for institutional noncompliance and systematic disregard of the law if the conduct is common place.

FORMAL OPINION 2003-F-01

DATE ISSUED: January 13, 2003

REQUESTED BY: Timothy Priebe, Dickinson City Attorney

ATTORNEY GENERAL'S OPINION: It is my opinion that a violation of a municipal ordinance equivalent to N.D.C.C. § 39-06-42(1) is an "offense" permitting its use to invoke the enhanced penalty imposed by that section against repeat offenders.

EMERGENCY MEASURES

<u>Bill Number</u>		<u>Effective Date</u>
House Bill 1046	Speed limits	03/20/03
House Bill 1215	Tampering, disabling, or sounding fire alarms or fire equipment	03/28/03
House Bill 1353	Retail sale of methamphetamine precursor drugs	04/07/03
Senate Bill 2080	Snowmobile operation	03/19/03
Senate Bill 2211	Mandatory prison terms for armed offenders (felony drug possession)	04/04/03
Senate Bill 2212	Sex offenses - deprived child definition, abuse reporting	03/26/03

All bills filed with the Secretary of State, including emergency measures and their effective dates, may be found at: <http://www.state.nd.us/sec/Elections/2003bills.htm>.

This report is intended for the use and information of law enforcement officials and is not to be considered an official opinion of the Attorney General unless expressly so designated. Copies of opinions issued by the Attorney General since 1993 are available on our website, www.ag.state.nd.us, or can be furnished upon request.